IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 317 OF 2003.

Shri Xavier Fernandes,
represented by the
President, The Goa
M.R.F. Employees Union,
"Saidham" Dhavalimol,
P.O. Kavlem, Ponda. ... Petitioner.

Versus

1. M/s. M.R.F. Limited,
   P.O. Box No. 1,
   Usgao, Ponda.
2. Industrial Tribunal,
   Shram Shakti Bhavan,
   E.D.C. Complex,
   Pato, Panaji. ... Respondents.

Mr. Valmiki Menezes, Advocate for the Petitioner.

Mr. G.K. Sardessai, Advocate for the Respondents.

Coram : F.I. REBELLO, J.

Date : 24th July 2003.

ORAL JUDGMENT

Rule. Returnable forthwith.

2. The limited issue involved in this petition is whether the request by the petitioner herein to decide the following issue: whether the Party-I proves that he was a protected workman and his termination of service is in violation of the provisions of Section 33(3) of the Industrial Disputes Act, 1947, should be decided as a preliminary issue?

3. The learned Tribunal allowed the request of the petitioner herein to frame an additional issue but,

however, rejected the request to decide the additional issue as a preliminary issue for reasons disclosed in the Order. That is the subject matter of the present petition, which has been filed under Article 227 of the Constitution of India. It may be mentioned that on behalf of the respondents, their learned counsel has no objection to the issue being framed as a preliminary issue. However, it is necessary to give some reasons in furtherance thereof as in view of the law now explained by the Apex Court in **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. v. Shri Ram Gopal Sharma and others**, 2002 1 CLR 789, the issue is likely to arise in a large number of matters. It was the case of the petitioner that on 30th August 1996, the charter of demands served by the Union on 29th August 1996, was admitted to conciliation. The petitioner was dismissed from service on 5th October 1996. The failure report in respect of the charter of demands was recorded on 28th October 1996.

The dispute of the petitioner's termination of service was referred to the Industrial Tribunal by Order, dated 13th February 1998. On 28th March 2003, the petitioner filed an application for framing additional issue as to the protected status of the petitioner and failing to file an application under Section 33 for permission and approval for trying the said issue as a preliminary issue. The Industrial

Tribunal allowed the application partly for framing the additional issue but rejected the prayer for hearing that issue as a preliminary issue. The law is well settled that there are certain issues which go to the root of the jurisdiction of the Tribunal to hear the reference which can be decided as a preliminary issue. Normally jurisdictional issues and the findings recorded therein would result either in the Tribunal proceeding to answer the reference or rejecting the reference. The issue insofar as answering the issue whether there has been failure to comply with the requirement of Section 33(3), in that context, is not really an issue which goes to the root of the jurisdiction and on which is dependent the Tribunal's jurisdiction to proceed further in the matter. This is what weighed with the learned Industrial Tribunal when it chose not to treat the issue as a preliminary issue.

4. The object of industrial laws is to ensure industrial peace so that the wheels of industry keep moving. One aspect of that jurisdiction would be that the matters are disposed off at the earliest. The exploding dockets of the Industrial Tribunal/Labour Courts is a classic illustration of the failure to expeditiously resolve industrial disputes. It is with that objective in mind that Courts will have to find ways and means in narrowing the controversy so as to

ensure early and effective disposal of references, if in law, it is so possible to provide. The Judgment, therefore, in Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. (supra) will to an extent, considering the ratio therein, with help to dispose of either an application under Section 33A or a reference under Section 10 if there is failure by the employer to comply with the requirements of Section 33 of the Industrial Disputes Act. It is not necessary to reproduce the provision thereto. The petitioner herein in the claim statement had set out as under:-

> "The Union submits at this juncture that the said workman was a protected workman under the provisions of the Industrial Disputes Act, 1947 and on the date of termination of his service, conciliation proceedings relating to the industrial dispute between the management of MRF Ltd. and their workmen represented by The Goa MRF Employees Union in the matter of Charter of demands was in progress. The conciliation proceedings were under Ref. No. IRM/CON/Ponda/(104)/1996."

5. With that I now come to what was in issue in Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd, before the Constitutional Bench of the Apex Court. The question for consideration before the Apex Court was as under:-

> "If the approval is not granted under Section 33(2)(b) of the Industrial Disputes Act, 1947, whether the order of dismissal becomes ineffective from the date it was passed or from the date of non-approval of the order of

dismissal and whether failure to make application under Section 33(2)(b) would not render the order of dismissal inoperative?"

The issue was answered by the Apex Court, which held as under:-

"To put it in other way, the said conditions being mandatory, are to be satisfied if an order of discharge or dismissal passed under Section 33(2)(b) is to be operative. If an employer desires to take benefit of the said provision for passing an order of discharge or dismissal of an employee, he has also to take the burden of discharging the statutory obligation placed on him in the said proviso. Taking a contrary view that an order of discharge or dismissal passed by an employer in contravention of the mandatory conditions contained in the proviso does not render such an order inoperative or void, defeats the very purpose of the proviso and it becomes meaningless. it is well-settled rule of interpretation that no part of statute shall be construed as unnecessary or superfluous. The proviso cannot be diluted or disobeyed by an employer. He cannot disobey the mandatory provision and then say that the order of discharge or dismissal made in contravention of Section 33(2)(b) is not void or inoperative. He cannot be permitted to take advantage of his own wrong. The interpretation of statute must be such that it should advance the legislative intent and serve the purpose for which it is made rather than to frustrate it. The proviso to Section 33(2)(b) affords protection to a workman to safeguard his interest and it is a shield against victimization and unfair labour practice by the employer during the pendency of industrial dispute when the relationship between them are already strained. An employer cannot

> be permitted to use the provision of Section 33(2)(b) to ease out a workman without complying with the conditions contained in the said proviso for any alleged misconduct said to be unconnected with the already pending industrial dispute. The protection afforded to a workman under the said provision cannot be taken away. If it is to be held that an order of discharge or dismissal passed by the employer without complying with the requirements of the said proviso is not void or inoperative, the employer may with impugnity discharge or dismiss a workman."

6. The Apex Court then proceeded to consider what happens when no application is made or the one made is withdrawn. That was answered in the following words:-

> " The view that when no application is made or the one made is withdrawn, there is no order of refusal of such application on merit and as such the order of dismissal or discharge does not become void or inoperative unless such an order is set aside under Section 33A, cannot be accepted. In our view, not making an application under Section 33(2)(b) seeking approval or withdrawing an application once made before any order is made thereon, is a clear case of contravention of the proviso to Section 33(2)(b). An employer who does not make an application under Section 33(2)(b) or withdraws the one made, cannot be rewarded by relieving him of the statutory obligation created on him to make such an application. If it is so done, he will be happier or more comfortable than an employer who obeys the command of law and makes an application inviting scrutiny of the authority in the matter of granting approval of the action taken by him. Adherence to and obedience of law should be obvious and necessary in a system governed by rule of law. An employer by design can avoid to make an application after

> dismissing or discharging an employee or file it and withdraw before any order is passed on it, on its merits, to take a position that such order is not inoperative or void till it is set aside under Section 33A notwithstanding the contravention of section 33(2)(b) proviso, driving the employee to have recourse to one or more proceeding by making a complaint under Section 33A or to raise another industrial dispute or to make a complaint under Section 31(1). Such an approach destroys the protection specifically and expressly given to an employee under the said proviso as against possible victimization, unfair labour practice or harassment because of pendency of industrial dispute so that an employee can be saved from hardship of unemployment."

It is therefore clear that failure to comply with the requirements of Section 33 would result in the position being that the Order of discharge or dismissal had never been passed and consequently that the employee is deemed to have continued in service entitling him to all the benefits available.

7. Therefore, in a case like this, where there is a specific plea of contravention of Section 33, the complaint under Section 33A and/or reference under Section 10 in the case of termination of service can be answered if the Tribunal comes to the conclusion that the predicates of Section 33 are attracted. Once this is the position in law, in my opinion, it would be appropriate that the Industrial Tribunal in order to dispose of the reference under Section 10 or the complaint under Section 33A decide the issue as a

preliminary issue, though really speaking it does not touch the jurisdiction of the Tribunal to proceed with the reference or the complaint.

8. In the light of what has been set out above, the impugned Order of the Tribunal to the extent it has rejected the application of the workman for deciding the preliminary issue is set aside. The Tribunal is directed to dispose of the said issue as a preliminary issue. This direction to be followed in all such matters where there is such a specific plea and prima facie some material is placed by way of affidavit or pleadings showing that the employer has violated the mandate of Section 33 while terminating the service of a workman whether it be by way of dismissal and/or otherwise. Rule made absolute accordingly. In the circumstances of the case, there shall be no order as to costs.

(F.I. REBELLO)
JUDGE.

ed's.